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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BELLE FOURCHE PIPELINE COMPANY,
EQUITABLE OIL PURCHASING COMPANY,
EIGHTY-EIGHT OIL COMPANY,
BLACK HILLS TRUCKING, INC.,
J. FRANK POTTORFF AND H. A. TRUE, JR.
Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO "BRIEF OF RESPONDENTS IN OPPOSITION"

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Belle Fourche Pipeline Company ("Belle Fourche"), Equitable Oil Purchasing Company, Eighty-Eight Oil Company, and Black Hills Trucking, Inc. and their principal officers, J. Frank Pottorff (now deceased) and H. A. True, Jr., (herein collectively referred to as "Targets") have petitioned for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit dismissing for lack of subject matter jurisdiction a district court's declaratory judgment that petitioners were not subject to regulatory jurisdiction of the respondent Federal Energy Regulatory Commission ("FERC"), and an order of the district court enjoining the further enforcement of subpoenas *duces tecum* seeking evidence to prosecute the petitioners for the

violation of certain provisions of the Interstate Commerce Act, 49 U.S.C. Sections 1, et seq., which are inapplicable to non-jurisdictional entities, for the sole reason that the subpoenas were not "ripe" for review because "an adequate legal remedy existed for challenging the validity of the subpoena(s) in a subsequent enforcement hearing", without considering the irreparable injuries to be suffered by the targets if a determination of their jurisdictional status was deferred. The Respondent has filed its "Brief in Opposition" to the petition for certiorari. Petitioners hereby reply.

ARGUMENT IN REPLY

Both the respondents and the Court of Appeals have mischaracterized the issues in this case. The principal issue before the Supreme Court is whether the District Court acted properly when it determined the jurisdictional status of four targets to prevent FERC from seizing records from the targets and their customers and shippers when the undisputed facts showed that targets were wholly outside the regulatory jurisdiction of the agency and the documents seized did not relate to any matter within the scope of the Agency's regulatory or investigative authority. A secondary issue is whether the Court of Appeals erred in reversing the District Court's jurisdictional finding solely on the basis of *Reisman* v. *Caplin*, 375 U.S. 440 (1964) without giving any consideration whatsoever to the jurisdictional findings of the District Court.

Certain factual allegations and legal conclusions asserted by the FERC in its "Brief for the Respondents in Opposition" are wholly inaccurate and purposely misleading.[1] Such statements

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[1] For example, in paragraph 2a on page 3 of Respondents' Brief it is stated that "Petitioner Belle Fourche *and its affiliates* operate *an oil transportation system* in Montana, North Dakota, and Wyoming (record citations omitted)." (Emphasis supplied) This statement in respondents' Brief is, with the exception of the added words "and its affiliates," a verbatim quote from the opinion of the Tenth Circuit Court of Appeals in this case (Pet. App. A-2). It is an

and conclusions are obviously made by FERC as a diversionary tactic to mislead this Court, as they did the Court of Appeals, that the four targets are jurisdictional without directly arguing the point. Although the only real issue that ever existed, and the sole subject of a two day trial, was whether the four targets are subject to FERC regulatory jurisdiction, FERC assumes jurisdiction by oblique insinuations and argues that the only issue in the case is whether targets' objections to certain subpoenas were premature under *Reisman* v. *Caplin*. Petitioners have never contended that FERC was without authority to issue lawful subpoenas against jurisdictional entities, or that *Reisman* v. *Caplin* would not apply in such cases. The only subpoena questions presented in this case, as part of the agency abuse, concerned their incredible broadness as applied to non-jurisdictional targets.

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inaccurate characterization of the operations of Belle Fourche, particularly from the standpoint of the issues of this case. Belle Fourche actually has three pipeline systems only one of which, as observed by Judge Brimmer in his Memorandum Opinion (Pet. App. B-2), is involved in this controversy. It is located wholly in Wyoming, and the other two pipeline systems that were not involved in the investigation with which this case is concerned are engaged in interstate commerce crossing state lines. The gratuitous addition of the words "and its affiliates" by the Respondents confuses the issues of this case by leaving the erroneous impression that Belle Fourche's Wyoming System and its three affiliates have some relationship with interstate oil pipeline operations.

In addition, that same paragraph goes on to say that oil delivered over Belle Fourche's Wyoming system is ultimately transported from Wyoming to other states. That statement leaves the impression that the oil moves in interstate commerce which is contrary to the District Court's finding that Belle Fourche's Wyoming shipments are solely intrastate in nature.

Finally, the bald reference in that same paragraph to the fact that Belle Fourche has had tariffs on file with FERC covering its Wyoming line omits to tell the undisputed fact that the reason for filing FERC tariffs was to have them available should a customer request an interstate shipment. No showing was made at the trial of this case that any such requests had ever been made for several years prior to the trial.

Moreover, this is not a case that involves a forced seizure of evidence under subpoenas, but is one where the targets consented to an investigation which got out of hand. The record shows that FERC was invited to Casper, Wyoming to review petitioners' records to establish their non-jurisdictional status. However, instead of making jurisdictional inquiries, FERC's Office of Enforcement seized thousands of documents from the four targets relating solely to Belle Fourche's Wyoming system, and despite its having more than sufficient evidence to determine the controlling jurisdictional issues, continued to compile documentary evidence to prosecute the targets for violation of federal laws that are wholly inapplicable to non-jurisdictional entities. FERC also issued subpoenas against targets' shippers and customers for documents relating to targets' activities.

The evidence adduced at the trial demonstrated beyond any question of a doubt — and the Trial Court expressly found — that Belle Fourche's Wyoming system is an intrastate pipeline operation and had been strictly intrastate for many years prior to the trial and that its three affiliate targets are also intrastate in character and have no involvement whatsoever with Belle Fourche's interstate activities. This is not a case of mere abuse of authority over jurisdictional entities, but a case of total absence of jurisdiction.

The error, therefore, to which this Petition for Certiorari is addressed concerns not the procedural principles laid down by this Court in *Reisman* v. *Caplin*, but rather it calls specific attention to the failure of the Court of Appeals to address the jurisdictional issues which were the principal questions with which the parties and the District Court were concerned in the trial of this case. Petitioners have simply been deprived of their day in court by a procedural ploy. Clearly, the principle enunciated by *Reisman* v. *Caplin* upon which the Court of Appeals relied so heavily was a non-issue before the District Court. What the Petitioners are trying to accomplish through

this proceeding is to get this case back on the track where it belongs: to reinstate the District Court's decision on the jurisdictional issues which were actually tried, rather than on the subpoena enforcement non-issue that constituted the sole basis for the reversal of the District Court's judgment by the Court of Appeals.

As it stands, the Court of Appeals decision in this case is a dangerous precedent. It says in effect that the District Court can not step in to stop an agency investigation of targets who are totally outside the arena of the agency's regulatory authority — as contrasted with mere overreaching or abuse of agency authority. The decision also says that when a target consents to an investigation of its records on the belief that the agency will discover that it "has the wrong man," the target has absolutely no remedy to protect itself from the seizure of its documents from its office and from its shippers and customers when the agency blunders ahead without considering the fact that the records they have seized show that they are pursuing the wrong man. Under the Court of Appeals' decision here the targets' only alternative is to terminate its consent for the investigation and make itself subject to an enforcement proceeding in a court to be chosen by the offending agency, which in this case would certainly be in Washington, D.C., 1,700 miles away from the targets' headquarters offices, and where the same case would be tried a second time without the help of local customers and shippers. If that District Court accepts the view, urged here by FERC, that the jurisdictional issues are also premature for determination in a subpoena enforcement case, the targets will then be obliged to transport dozens of crates of documents those same 1,700 miles, or 3,400 miles round trip, and to permit further prolonged and unlimited searches to be made of its business files. Moreover, the same burdensome experiences can be anticipated by all other companies who may have done business with the target regardless of how little or how infrequently they

may have engaged in transactions over the course of several years. This is not helpful in a competitive business arena.

The disagreement FERC had with the findings by the District Court that the operations of Belle Fourche were beyond the jurisdictional authority of that agency and that court's other findings of agency abuse should have been submitted directly and without qualification to the Court of Appeals for determination rather than subverting those key issues by ignoring them and instead arguing the non-issue of an agency's authority to investigate under reasonable subpoenas.

Regardless of all this, *Reisman* v. *Caplin* is no authority for the deliberately misconceived issue advanced by FERC in the Court of Appeals and accepted by that appellate court. In *Reisman* v. *Caplin* the target was clearly jurisdictional and had the right under IRS regulations to object to the taking of documents in the possession of his accountants. In the case at bar, the targets are non-jurisdictional and have no right to object to the taking of their contracts and other documents from their shippers and customers.

Furthermore, in this case, judicial relief was not sought until after FERC had spent almost two weeks time taking enormous quantities of documents from the targets. During the course of this excessive activity it became painfully evident there was no stopping this invasion of the business nor would there be any effort on the part of FERC to make a necessary preliminary finding from examining the documents that it had no jurisdiction over the system it was investigating or the affiliated companies. The Agency admitted to the District Court that they were not giving any attention to the jurisdictional aspects of the case. This was not a case, therefore, of stopping an anticipated excessive or merely hypothetical exercise of authority, but was a real live case of burdensome excesses committed by investigators who were acting without any restraint to a point of violating basic rights of the petitioners. The action filed by petitioners in the

District Court, therefore, was not premature but was an emergency application of a tourniquet to stop the flow of vital documents through a wound already inflicted by the excesses and abuses of over-zealous agency investigators acting wholly outside their jurisdictional limits and investigating non-jurisdictional matters.

CONCLUSION

The Brief for the Respondents verifies Petitioners' contention that the FERC is using the procedural principles laid down by this Court in *Reisman* v. *Caplin, a non-issue before the District Court,* to side-step and avoid the District Court's declaratory judgment that petitioners were solely intrastate in nature and therefore not subject to FERC *regulatory* jurisdiction under the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* The Court of Appeals did not address this jurisdictional issue although there was a full trial on the merits *on that sole issue,* participated in by FERC's General Counsel. The declaratory judgment on the jurisdictional issue was entered by the District Court to call a halt to ten years of agency abuse of the four non-jurisdictional entities that included wholesale taking of their records, business interference, harassments of their intrastate shippers and business customers, and interference with the state regulatory process. The excessive breadth of the subpoenas involved here was only a part of the agency abuse found by the District Court.

This Court should make it clear that *Reisman* v. *Caplin* is applicable to pre-enforcement subpoena cases only where jurisdictional entities are involved. Where other allegations of agency abuse are involved, or where the targets are clearly non-jurisdictional, the District Court has the right and duty to step in, as it did here. If this case stands, there will be no distinction between the rights of jurisdictional and non-jurisdictional entities insofar as agency investigations are concerned. When FERC appealed from the District Court's decision on the jurisdictional issues, and on the Court's findings of agency abuse, petitioners were

entitled to have such issues considered point by point by the Court of Appeals, not turned aside on the sole ground that *Reisman* v. *Caplan* applied to the subpoenas.

If the decision of the Court of Appeals here is affirmed, all administrative agencies are given free rein to abuse and harass non-jurisdictional entities for political or other purposes so long as the Agency does not invoke a district court's jurisdiction in a subpoena enforcement case. Applied here, the FERC Office of Enforcement can continue to abuse the four non-jurisdictional targets with impunity for another ten years without making any determination of their jurisdictional status. The agency can continue to seize petitioners' records from their shippers and customers, and give them the Hobson's choice of federal compliance or prosecution, even though they are already subject to state regulatory jurisdiction and a federal court has found them to be non-jurisdictional in a case from which FERC *did not appeal on that issue.*

The District Court's inherent right to act in agency abuse cases must not be taken away by the misapplication of procedural rules like those set forth in FERC's only defense, *Reisman* v. *Caplan.* By failing to address the jurisdictional issues the Court of Appeals has clearly deprived petitioners of their day in Court.

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CERTIFICATE OF SERVICE

I, Jack Vickrey, a member of the bar of this Court, hereby certify that I have this day caused copies of the foregoing REPLY BRIEF OF PETITIONERS TO "BRIEF OF RESPONDENTS IN OPPOSITION" to be placed in the care of the U.S. mail, certified mail, return receipt requested, postage prepaid, to counsel at the following addresses:

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All parties required to be served have been served.

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DATE